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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN WILLIAMS,

Defendant and Appellant.

2d Crim. No. B199156
(Super. Ct. No. BA315807)
(Los Angeles County)

Steven Williams appeals a judgment after his conviction of selling cocaine base (Health & Saf. Code, § 11352, subd. (a)), and possession of cocaine base (§ 11350, subd. (a)). We conclude that: 1) the trial court gave proper instructions to the jury on the issue of credibility and gave a proper cautionary instruction to correct a statement made by the prosecutor in oral argument, 2) an in camera *Pitchess* review (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) by this court is not required, and 3) a probation condition must be modified because it did not include a knowledge requirement. We order the probation condition modified, but in all other respects we affirm.

FACTS

Police Officer Chris Luna was watching for potential narcotics activity. He observed Williams standing on the sidewalk. A man named Huang approached Williams and handed him a \$10 bill. Williams gave Huang a "single off-white solid that resembled

rock cocaine." Huang reached into his left pants pocket. He "removed a cocaine pipe and transferred it to his right hand"

Luna believed that Huang was going to smoke the cocaine. He "radioed" for assistance and requested that Huang be detained. When police officers approached Huang and identified themselves, Huang dropped the pipe and the "off-white solid" substance. That substance was "cocaine in the form of cocaine base."

Williams started to walk away at a quick pace. As police officers approached him, he dropped "a small white solid." When the police searched Williams, they found "a glass cylinder commonly used for smoking rock cocaine" in his pants pocket. The substance Williams dropped was "cocaine in the form of cocaine base."

In the defense case, Williams testified that when he saw the police, he dropped "a small piece of crack cocaine." He was also carrying "two crack pipes." Williams said that he was not selling drugs.

On cross-examination, the prosecutor asked Williams why he could not have put the rock cocaine in his pocket. Williams answered, "Because when they pulled up, whoever this person is, I guess, in this photo you're depicting I'm in, both of us look like a flag. I'm in orange; he's in yellow. That doesn't depict a drug sales person, and that doesn't depict the person that buys in the daytime but anyway-" The court granted the prosecutor's motion to strike the answer as nonresponsive.

The prosecutor asked, "[W]hy did you throw away good cocaine?" Williams: "I know it wasn't right for me to have those pipes, and that two dollar piece of crack. I mean I'm very sorry for that, but I'm not a mass murderer or anything like that, sir." The prosecutor: "Sir, you're not on trial for mass murder. You're on trial for selling cocaine. You understand that; right?" Williams: "Which I did not do." The prosecutor: "Move to strike. Nonresponsive, Your Honor." The court: "Sustained. Stricken. Jury is admonished to disregard."

DISCUSSION

I. *The Jury Instructions*

Williams contends: 1) that the trial court erred by giving a CALCRIM No. 226 credibility instruction, and 2) the combination of jury instructions the court gave was confusing and improperly led jurors to believe that they could consider answers by Williams, which the court struck as non-responsive, in evaluating his credibility. We disagree.

In determining whether the jury was properly instructed, we do not look to a particular instruction in isolation, we review all the instructions the court gave. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) "The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*Ibid.*) "If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied [it]." (*Ibid.*)

Here the court gave a CALCRIM No. 226 instruction which advised the jury, among other things, that in evaluating a witness's credibility it could ask, "*Did the witness understand the questions and answer them directly?*" (Italics added.) CALCRIM No. 226 instructs "the jurors [that] they alone must determine the credibility or believability of the witnesses and [it sets] forth a number of factors the jurors may consider in making this determination." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 939.) One of these factors, a witness's evasive answers, has been an established credibility factor long before the adoption of CALCRIM No. 226. (*People v. Escarcega* (1969) 273 Cal.App.2d 853, 862.)

Williams claims this instruction should not have been given here because of the prosecutor's argument to the jury. He notes that in closing argument the prosecutor said that Williams "mentioned a number of things *that were all nonresponsive to the question. I kept objecting nonresponsive. Most of my objections . . . were sustained. What that means is . . . that he's not responding to the question.*" (Italics added.)

The trial court recognized a problem with the prosecutor's remarks. In a hearing outside the presence of the jury, it told the prosecutor, "[w]hen you talked about

the defendant's credibility during your argument, you properly told the jury that they could consider under [CALCRIM No. 226] as one of the credibility factors whether the witness understood the questions and answered them directly. In other words, when a defendant is evasive and non-responsive, I think under 226 that is a proper consideration for the jury."

The court then said, "*The problem was that you went beyond that and said that the jury should take note of the fact that the court sustained a number of non-responsive objections during testimony.* Now, that is true, I did. . . . [¶] But . . . when you urge the jury to consider the court's rulings . . . sustaining the non-responsive objections, you're interjecting the court into that credibility determination and that's not really proper." (Italics added.)

The court decided that it needed to give a cautionary instruction so that jurors would not be misled by the prosecutor's remarks.

The court told the jury that when the prosecutor "spoke to you about the credibility of the defendant, he mentioned the fact that I had sustained some objections during cross examination. *The rulings that I made concern only the admissibility of evidence and are not to be considered by you in determining the credibility of a witness or for any other purpose. You may consider whether the defendant or any witness understood the questions and answered them directly, but my rulings are not to be considered by you for any reason.*" (Italics added.)

The court also gave jurors a CALCRIM No. 222 instruction, which states in relevant part, "During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. *If I sustained an objection, you must ignore the question.* If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. *If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.*" (Italics added.)

Williams claims that these instructions were conflicting, confusing and that they misled the jury. We disagree.

Taken together, these instructions were clear, consistent, and no reasonable juror would be confused. The court gave the cautionary instruction about the prosecutor's remarks to protect Williams' right to a fair trial. It addressed the potential problem of jurors using the court's motion to strike rulings as a negative credibility factor against Williams. It corrected the prosecutor's suggestion that jurors could consider or rely on such rulings. The CALCRIM No. 222 instruction cautioned jurors not to consider the answers given to stricken testimony or the questions asked where the court sustained the objection. This protected Williams by preventing jurors from using his stricken testimony in evaluating his credibility.

Jurors were, of course, otherwise free to evaluate how Williams answered other questions. CALCRIM No. 226 permits them to make such a determination. It is a valid credibility instruction which allows jurors to consider whether a witness gave evasive answers. It is also a neutral instruction. It allows jurors to consider whether a prosecutor's witnesses were evasive.

The combination of these instructions was not confusing. The instructions defined the limits of the jury's credibility evaluations, prevented jurors from engaging in speculation or in considering matters that could be prejudicial to Williams. Taken as a whole, these instructions gave jurors clear guidance about what they could and could not consider when evaluating credibility. Jurors knew that in determining whether a witness evasively answered questions they could not consider the matters prohibited by CALCRIM No. 222 and the court's cautionary instruction. There was no error.

II. *The Pitchess Motion*

Williams notes that he filed a *Pitchess* motion (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531) in the trial court. He requests that we make a review of "any material turned over to the trial court *in camera*" as a result of that motion. Such a request is appropriate where the trial court conducted an in camera review of police department documents showing evidence of possible misconduct by police officers.

But here the record reflects that after Williams filed this motion, he requested the court to take it off calendar. There were no in camera proceedings conducted

by the trial court and there were no rulings on this motion. Consequently there is nothing for this court to review.

III. *The Probation Condition*

Williams claims that one of his probation conditions is constitutionally vague. He notes that the trial court ordered that he must "[s]tay away from places where users, buyers or sellers [of drugs] congregate." He claims this condition is overbroad because it is not limited "to areas *known to him* to be such places." (Italics added.) The Attorney General agrees. They are correct.

A probation condition that requires the defendant to stay away from prohibited areas or activity must contain "an explicit knowledge requirement" to "render the condition constitutional." (*In re Sheena K.* (2007) 40 Cal.4th 875, 892.) Otherwise, the defendant could be cited for a parole violation for innocently and unknowingly entering an area that only the police know to be prohibited. (*Ibid.*) Because the condition imposed by the trial court does not contain a defendant's knowledge requirement, it must be modified. (*Ibid.*)

The trial court is ordered to modify the probation condition to include a knowledge requirement. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

David M. Mintz, Judge
Superior Court County of Los Angeles

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